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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ISMAEL MARTINEZ CABRERA,

Defendant and Appellant.

H043472

(Santa Clara County

Super. Ct. No. C1514191)

Defendant Ismael Martinez Cabrera challenges two conditions of mandatory supervision imposed during his sentencing on convictions for transporting heroin and methamphetamine for sale (Health & Saf. Code, §§ 11352, subd. (a), 11379, subd. (a)). The challenged conditions subject electronic devices in defendant's possession to warrantless search and require him to provide passwords for those devices whenever requested by law enforcement. Defendant argues the conditions are unreasonable and overbroad. For the reasons stated here, we will affirm the judgment.

**I. TRIAL COURT PROCEEDINGS**

This factual summary is based on police reports in the record as defendant waived preparation of a full probation report. Multiple law enforcement agencies investigated a conspiracy to distribute heroin and methamphetamine "in the form of a seven-day-per-week heroin delivery service between San Joaquin and Santa Clara Counties." One member of the conspiracy received "regular telephone orders for heroin," which would then be delivered to customers in Santa Clara County. Based on that investigation, law

enforcement concluded that defendant was the “most senior driver/courier” for the organization. Defendant had registered several delivery vehicles in derivations of his name on behalf of the organization.

Law enforcement obtained search and arrest warrants covering several addresses in Stockton and San Jose, and several individuals (including defendant). During surveillance before the search warrants were executed, federal Drug Enforcement Agency agents noticed a car leave one of the Stockton addresses listed in the warrant. Agents followed the car to a gas station in San Jose and contacted the driver, who was one of the individuals named in an arrest warrant. A car search uncovered approximately 100 small balloons in a hidden compartment; some balloons contained heroin and others contained methamphetamine. Execution of the search warrants produced money, firearms, suspected drug ledgers, digital scales, and several cellular phones.

Defendant and five codefendants were charged in a single felony complaint with several drug-related crimes. Defendant was charged with four counts of transporting methamphetamine for sale (Health & Saf. Code, § 11379, subd. (a); counts 1, 3, 6, 8), five counts of transporting heroin for sale (Health & Saf. Code, § 11352, subd. (a); counts 2, 4, 5, 7, 9), two counts of possessing heroin for sale (Health & Saf. Code, § 11351; counts 10, 15), two counts of transporting a controlled substance between noncontiguous counties (Health & Saf. Code, §§ 11352, subd. (b), 11379, subd. (b); counts 11, 13); two counts of possessing methamphetamine for sale (Health & Saf. Code, § 11378; counts 12, 16), three counts of using a false compartment to store controlled substances (Health & Saf. Code, § 11366.8, subd. (a); counts 14, 18, 19), and one count of maintaining a place to sell heroin and methamphetamine (Health & Saf. Code, § 11366; count 17).

As part of a negotiated disposition, defendant pleaded no contest to three counts of transporting heroin for sale (Health & Saf. Code, § 11352, subd. (a); counts 2, 4, 5), and one count of transporting methamphetamine for sale (Health & Saf. Code, § 11379,

subd. (a); count 1). The trial court sentenced defendant to the upper term of five years for count 2, with two years to be served in county jail and the remaining three years to be spent on mandatory supervision. (Pen. Code, § 1170, subd. (h)(5)(B).) The trial court imposed concurrent upper term sentences for the remaining three convictions.

Defense counsel objected at sentencing to two proposed supervision conditions related to searches of defendant's electronic devices. The court asked whether electronic devices had been involved in the case, and the prosecutor responded that the case was an "extensive wire tap investigation that involved hundreds of calls regarding narcotic sales every day during the course of a several month investigation." Defense counsel argued the conditions were overbroad and unreasonable, contending that the use of a cellular phone in a crime does not establish a "sufficient nexus that he gives up all privacy in any electronic communication."

As imposed at the sentencing hearing, the first electronic device condition provides that defendant's "electronic devices, including but not limited to cell phones, laptop computers[,] and notepads will be subject to a forensic analysis search." The second electronic device condition states: "The defendant is to provide the passwords to any of these electronic devices within his custody and control and shall submit those devices to search without the necessity of a warrant whenever requested by any police officer." (The text of the conditions in the summary probation report does not materially differ from the oral pronouncement.)

## **II. DISCUSSION**

Defendant argues the two conditions related to electronic devices are unreasonable under the principles articulated in *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), and are also unconstitutionally overbroad.<sup>1</sup> We note at the outset that mandatory supervision is

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<sup>1</sup> The Supreme Court has granted review in several cases to determine the validity of probation conditions like those imposed here. (E.g., *In re Ricardo P.*, review granted February 17, 2016, S230923.)

more akin to parole than probation, because it is part of a felony sentence imposed after probation has been denied or revoked. (*People v. Martinez* (2014) 226 Cal.App.4th 759, 763 (*Martinez*)). We therefore analyze conditions imposed as terms of mandatory supervision in the same manner as parole conditions. (*Ibid.*)

#### **A. REASONABLENESS**

We review the reasonableness of a mandatory supervision condition for abuse of discretion. (*Martinez, supra*, 226 Cal.App.4th at p. 764.) The reasonableness of a parole condition (and by extension, a mandatory supervision condition) is analyzed under the three criteria discussed in *Lent*. (*Ibid.*) A mandatory supervision condition will not be found unreasonable unless: (1) the condition has no relationship to the crime of which defendant was convicted; (2) the condition relates to conduct that is not in itself criminal; and (3) the condition requires or forbids conduct that is not reasonably related to future criminality. (*Ibid.*; citing *Lent*, at p. 486.)

Defendant separates his discussion into the type of electronic device regulated. He “concedes that certain types of cellphones could not meet the *Lent* test” because “certain types of cellphones were used to facilitate the drug courier enterprise here.” But he contends, without citation to the record, that smartphones are generally not an integral part of drug courier enterprises and argues that only “prepaid disposable cellphones [that] are the choice of drug dealers” should be regulated. The problem with defendant’s argument is that a smartphone (specifically, an iPhone) was seized from one of the addresses during the warrant searches, providing support for a conclusion that smartphones were involved in the criminal operation.

As for electronic devices other than prepaid disposable cellphones, defendant argues “there can be no question” that the challenged conditions meet the two disputed *Lent* criteria. The People concede that the second *Lent* criterion is satisfied because using electronic devices is not an inherently criminal activity. Regarding relationship to the crime committed (*Lent, supra*, 15 Cal.3d at p. 486), defendant argues there was “no

evidence that electronic devices such as computers or notepads were an[y] part of the drug courier enterprise.” And defendant argues “there is no reason to believe” that the condition is reasonably related to future criminality. (*Lent*, at p. 486.) Though it appears cellular phones were the primary means of communication for the drug courier enterprise, individuals can communicate using a variety of electronic devices. Limiting the mandatory supervision condition to cellular phones would allow the condition to be easily circumvented by using a different type of electronic device to communicate about illegal activities. Allowing searches to a broader variety of electronic devices is reasonably related to deterring future criminal conduct by defendant. Defendant has not demonstrated an abuse of discretion.

## **B. OVERBREADTH**

We review de novo whether a mandatory supervision condition is unconstitutionally overbroad. (*Martinez, supra*, 226 Cal.App.4th at p. 765.) A condition is unconstitutionally overbroad only if the limitations placed on a defendant’s constitutional rights are not closely tailored to the purpose of that condition. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) In reviewing the closeness of the fit between the legitimate purpose of a condition and the burden it imposes on a defendant’s constitutional rights, we are mindful that “perfection in such matters is impossible, and that practical necessity will justify some infringement.” (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

### **1. First Amendment**

Defendant argues the challenged conditions limit his First Amendment right to free speech. (Citing *In re Stevens* (2004) 119 Cal.App.4th 1228.) But *Stevens* involved restrictions on a parolee’s access to the Internet (*id.* at pp. 1231–1232), whereas here the conditions allow unfettered access to electronic devices and merely make those devices subject to search. Defendant has not demonstrated that his First Amendment rights are curtailed by the challenged conditions.

## 2. Fourth Amendment

Defendant contends the challenged conditions limit his Fourth Amendment right to be free from unreasonable searches, and are unconstitutionally overbroad because they are not closely tailored to their purpose. “[P]arolees and probationers retain some expectation of privacy, albeit a reduced one.” (*In re Jaime P.* (2006) 40 Cal.4th 128, 137.) And “parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.” (*Samson v. California* (2006) 547 U.S. 843, 850 [finding California law subjecting all parolees to warrantless searches did not violate the Fourth Amendment].) The California Supreme Court has determined that “probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers.” (*People v. Robles* (2000) 23 Cal.4th 789, 795.) The concept applies with full force to mandatory supervision search conditions given that individuals under mandatory supervision have a lower expectation of privacy than probationers.

While defendant does retain some expectation of privacy, that expectation is greatly diminished until he completes his term of mandatory supervision. That diminished expectation of privacy is “markedly different from the broader privacy guaranteed under the Fourth Amendment to individuals who are not serving sentences or on grants of probation” or parole. (*In re Q.R.* (2017) 7 Cal.App.5th 1231, 1238, rev. granted April 12, 2017, S240222 (*Q.R.*)). “It is that pre-conviction expectation of privacy that was at issue in *Riley v. California* (2014) \_\_U.S.\_\_, [134 S.Ct. 2473] (*Riley*), where the United States Supreme Court announced the general rule that police may not conduct a warrantless search of a cellular phone seized incident to an arrest. (*Riley*, \_\_U.S. \_\_ [134 S.Ct. at p. 2485].)” (*Q.R.*, at p. 1238.)

It is undisputed that defendant used an electronic device while acting as a courier in transporting controlled substances for sale. The purpose of the challenged conditions is to prevent defendant from using electronic devices in the future to buy, sell, or

transport controlled substances. Defendant's use of an electronic device in committing the crimes that led to his conviction, as well as his status as an individual on the equivalent of parole instead of probation, distinguishes this case from those where similar probation conditions have been rejected as unconstitutionally overbroad. (See *In re P.O.* (2016) 246 Cal.App.4th 288, 291–293, 298 [modifying juvenile electronic device search juvenile probation condition because condition bore no relationship to public intoxication adjudication]; *People v. Appleton* (2016) 245 Cal.App.4th 717, 719–720, 728–729.) Defendant's use of an electronic device while committing his crimes makes this case more similar to *Q.R.*, where the minor had used an electronic device in committing the crimes that led to him being declared a ward of the court and we found no overbreadth in juvenile probation conditions allowing electronic devices to be searched. (*Q.R.*, *supra*, 7 Cal.App.5th at p. 1238, rev. granted.) Here, as in *Q.R.*, robust access to defendant's electronic devices is critical to ensure that he does not return to committing crimes while on mandatory supervision.

Defendant argues that under the challenged conditions his electronic devices could be searched for “banking and business information, medical and insurance information, games, music libraries, electronic books, magazines, and newspapers, and information related to his criminal case, including communications with his attorney.” But defendant is protected in the enforcement of the mandatory supervision conditions because warrantless searches carried out under a parole search condition must not be “conducted in an arbitrary, capricious, or harassing manner.” (*People v. Schmitz* (2012) 55 Cal.4th 909, 923.)

Given the facts of this case, we conclude that the fit between the legitimate purpose of the mandatory supervision conditions and the burdens they place on defendant's diminished constitutional expectation of privacy is sufficiently close. The conditions are not unconstitutionally overbroad as applied to defendant.

### **III. DISPOSITION**

The judgment is affirmed.



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Grover, J.

**WE CONCUR:**

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Premo, Acting P. J.

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Bamattre-Manoukian, J.

**H043472 - *People v. Cabrera***